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Freight Operations by Mexican Motor Carriers--
Implementation of North American Free Trade Agreement

Ex Parte No. 55 (Sub-No. 96)

INTERSTATE COMMERCE COMMISSION

1995 ICC LEXIS 270

SERVICE DATE: October 18, 1995

October 12, 1995

FMXSA-1998-3297-7
FMCSA-1998-3298-6
FMCSA-1998-3299-6

PANEL:

[*1]

By the Commission, Chairman Morgan, Vice Chairman Owen, Commissioners Simmons and McDonald.

OPINION:

ACTION: Proposed rules.

SUMMARY: The purpose of this Notice is to announce implementation of the provisions of the second phase of the North American Free Trade Agreement (NAFTA) relating to land transportation, and to promulgate rules and develop an application form required to carry out the provisions. Under existing law, effective December 18, 1995, the Commission will process applications filed by Mexican motor carriers of property for operating authority to provide service across the United States-Mexico international boundary line to and from points in California, Arizona, New Mexico, and Texas, and by persons of Mexico who establish enterprises in the United States seeking to distribute international cargo in the United States.

DATES: Comments must be filed by November 7, 1995.

ADDRESSES: An original and 10 copies of comments referring to Ex Parte No. 55 (Sub-No. 96) must be sent to: Interstate Commerce Commission, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue, N.W., Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT: Bernard Gaillard, (202) 927-5500 [*2] or Stanley M. Braverman, (202) 927-6316. [TDD for the hearing impaired: (202) 927-5721.]

SUPPLEMENTARY INFORMATION: Section 6 of the Bus Regulatory Reform Act of 1982 (codified at 49 U.S.C. 10922(m)) imposed a 2-year moratorium (subject to renewal) on the Commission's issuance of new grants of operating authority to motor carriers domiciled in or owned or controlled by persons of Mexico or Canada. Under this statute, the President has the authority to remove or modify the moratorium if he determines it to be in the national interest, i.e., if overriding economic or foreign policy considerations make such an action advisable, or if a negotiated settlement with one country or the other can be

reached. Under the moratorium, the President must notify Congress in writing 60 days before the date on which the removal or modification is to take effect.

Shortly after the moratorium went into effect, the President exercised his authority and removed the moratorium with respect to Canada. The President indicated in a memorandum to the United States Trade Representative that the United States and Canada had reached a bilateral understanding that would ensure fair and equitable treatment for [*3] both U.S. and Canadian motor carriers on both sides of the international boundary line. 47 FR 54053 (1982).

The moratorium remained in place for Mexican motor carriers because the Mexican Government continued to restrict U.S. motor carriers' access to Mexico. The moratorium prohibits Mexicans from seeking operating authority that carriers of other nations can obtain. n1

n1 The moratorium does not entirely bar Mexican carriers from operating in the United States. Pursuant to the provisions of 49 U.S.C. 10922(m) and 10530, Mexican carriers may operate in the United States, but only in United States border commercial zones, and only pursuant to certificates of registration known as "MX certificates."

NAFTA was signed on December 17, 1992. It "entered into force" (i.e., it took effect) on January 1, 1994. NAFTA contemplates that the moratorium on Mexican motor carriers will be lifted in phases, and that restrictions imposed by the Mexican government on U.S. carriers operating in Mexico will be similarly relaxed. n2 The phases are as follows:

1. The first phase of NAFTA granted access to Mexican charter and tour bus operators to provide international transportation service [*4] between Mexico and all points in the United States n3;
2. Three years after signature (December 17, 1995), NAFTA provides for access by Mexican motor property carriers into United States border States, and establishment of companies to distribute international cargo within the United States n4;
3. Three years after entry into force (January 1, 1997), NAFTA provides for access by Mexican regular-route passenger carriers to perform international service to all points in the United States;
4. Six years after entry into force, NAFTA provides for access for cross-border operations by Mexican motor property carriers to all points in the United States; and
5. Seven years after entry into force, NAFTA provides for bus services by Mexican carriers between points in the United States.

n2 The NAFTA schedule of liberalization does not remove all limitations on Mexican motor carrier operations in the United States. The moratorium will remain in place for Mexican carriers in the one area that was not liberalized, namely, point-to-point carriage of domestic cargo in the United States. This means that Mexican property carriers will be able to operate only in international commerce (between points in the United States and points in Mexico), but they will not be able to engage in transportation between points in the United States. [*5]

n3 In Passenger Operations By Mexican Carriers - NAFTA, 9 I.C.C.2d 1258 (1993), we crafted a special authorization for international charter and tour bus service.

n4 Because December 17, 1995 falls on a Sunday, we will begin processing applications on Monday, December 18, 1995.

Pursuant to 49 U.S.C. 10922(m)(2)(A), the President notified Congress, on November 4, 1993, in a Statement of Administrative Action to Implement NAFTA, of his intention to modify the moratorium in conformity with the entry phases of NAFTA. We are thus instituting a rulemaking proceeding, in anticipation of the President's specific modification of the moratorium, to implement phase 2 of NAFTA, which governs international cargo transportation between the U.S.-Mexico international boundary and points in the four U.S. border States, as well as the distribution and transportation of international cargo by a Mexican-owned or controlled company based in the United States.

We will require operating certificates for private as well as for for-hire Mexican carriers of property (including exempt commodities), n5 because the current moratorium on grants of authority to Mexican carriers clearly includes Mexican [*6] private carriers and carriers of exempt commodities. Indeed, the phase 2 NAFTA entry provisions, which contemplate a partial lifting of the moratorium, define "truck services" as including for-hire, private, or exempt services. North American Free Trade Agreement, January 1, 1994, Annex I - United States (1-U-19); see also North American Free Trade Agreement Implementation Act (Dec. 8, 1993), Pub. L. No. 103-182, 107 Stat. 2057, 190 U.S.C.S. 3301 (1993).

n5 These certificates may be obtained through the filing of an "OP-1MX Application form" for Mexican carriers.

Because NAFTA is designed to provide simultaneous access to each country's border States for international shipments and to allow the establishment of carriers to carry international cargo, reciprocal treatment in practice must be achieved. Accordingly, to guard against a failure to adhere to the NAFTA principles of reciprocal access for U.S. carriers in Mexico, the Commission will issue conditional grants of authority to Mexican applicants (common carriers, contract carriers, private carriers, household goods carriers, and companies established to distribute international cargo within the United States). The certificates [*7] that we issue to Mexican motor carriers will usually be framed to authorize service:

Over irregular routes, in foreign commerce, transporting general and exempt commodities (with the usual exceptions), between ports of entry on the international boundary between the U.S. and Mexico, on the one hand, and on the other, points in California, Arizona, New Mexico, and Texas.

Condition: The duration of this grant is subject to the condition that U.S. carriers obtain reciprocal access in Mexico. This certificate will terminate 30 days after service of a Commission decision finding that reciprocal access has not been granted by Mexico.

The Commission, on its own motion or on petition by interested persons, may initiate a proceeding to determine whether Mexico has failed to grant reciprocal access. The U.S. Department of Transportation (DOT) will be invited to participate in any such proceeding. Upon a determination by the Commission that reciprocal access in Mexico has been denied, the conditional grants of authority to Mexican carriers would be terminated. n6

n6 Reciprocal treatment does not require the establishment of identical entry procedures in both countries. Rather, NAFTA simply mandates reciprocal access in the territories of both countries. [*8]

Petitions to invoke the termination of these grants of authority will not be entertained in the absence of allegations of comprehensive efforts by Mexico to deny or discourage entry into or establishment of transportation operations within that country. All terminated grants would be reinstated upon a finding in a subsequent proceeding that reciprocity has been achieved.

In general, the application procedures and regulations that apply to United States for-hire carriers will also apply to Mexican carriers. n7 For example, to be issued operating certificates in accordance with current law, carriers must abide by all DOT safety regulations, comply with the Commission's insurance requirements (49 U.S.C. 10927, 49 CFR Part 1043), publish and file with the Commission applicable tariffs (49 U.S.C. 10761, 10762), and file with the Commission agents for service of process (49 U.S.C. 10330). After initiating service, carriers must maintain compliance with DOT's safety fitness standards. Failure to do so will result in the revocation of the authority.

n7 See 49 CFR Part 1160, along with the proposed amendments required to implement phase 2 of NAFTA.

Attached as Appendix A is the proposed [*9] OP-1MX Application and the instructions on how it should be completed. The application is designed to collect information from Mexican applicants seeking operating authority to conduct private and for-hire motor carrier cross border operations (including the carriage of exempt commodities) into and from the four United States border States, and for Mexican-owned or controlled enterprises established in the United States to transport international cargo in foreign commerce. Appendix B shows the proposed amendments to the insurance and application procedures contained in our regulations at 49 CFR Parts 1043 and 1160.

We believe that a separate application form designed to authorize this phase of NAFTA service will help to avoid confusion and errors, thereby improving the speed and efficiency of the application processing. At the request of the Federal Highway Administration, our application forms will alert applicants to the safety fitness conditions imposed on all certificates by the Commission in *Safety Fitness Policy*, 8 I.C.C.2d 123 (1991), and will require a certification that the applicant can produce records demonstrating compliance with the Federal Motor Carrier Safety Regulations [*10] and the Hazardous Materials Transportation Regulations. Because certain Mexican carriers may want to file "OP-2" Forms seeking authority to operate only in U.S. border commercial zones under the more limited MX certificates, rather than operating under the broader conditional licenses contemplated here, we will continue to process requests for MX certificates, unless Congress amends or repeals section 10530.

We will provide a short comment period to enable interested persons to submit written views, arguments, or representations. Comments filed with the Commission must be identified as such and must comply with the requirements for filing pleadings specified at 49 CFR 1104.1-1104.3. Pursuant to 5 CFR 1320.5(a) (iv) (A) (6), comments may also be filed with the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20403. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., we have examined the impact of this proposed action on small businesses and small organizations. We expect that the new application form designated for Mexican applicants (Form OP-1MX), and the corresponding regulations, will simplify and [*11] clarify the

application process. Use of the existing Form OP-1 for these new applications, by contrast, would cause confusion and would require more work on the part of Mexican carrier applicants. Therefore, the proposed action should reduce paperwork burdens on small businesses.

Paperwork Burden Analysis

We have submitted notice of this rulemaking and the new application Form OP-1MX, entitled Application for Operating Authority by Mexican Carriers Provided by the North American Free Trade Agreement, to the Office of Management and Budget (OMB) for review under Section 3504(h) of the Paperwork Reduction Act of 1980 [44 U.S.C. Chapter 35]. The form is designed to collect information from Mexican carriers to allow the Commission to evaluate whether an operating authority proposal meets the Commission's standards for granting certificates of authority.

We estimate that an average of 1.5 burden hours will be required to complete the proposed form. The Commission estimates it will receive approximately 18,800 applications each year for a total of 28,200 burden hours. The estimated burden hours include time for reviewing instructions, gathering and maintaining the needed data, and [*12] completing and reviewing the collection of information.

Environmental and Energy Considerations

We conclude that the rules proposed here will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects

49 CFR Part 1043

Insurance, Motor Carriers, Surety Bonds.

49 CFR Part 1160

Administrative practice and procedure, Brokers, Buses, Freight forwarders, Maritime carriers, Motor carriers, Moving of household goods.

Decided: October 12, 1995

APPENDIX: (Note: The following Appendix A will not appear in the CFR)

Appendix A

Form OP1-MX

Application for Operating Authority by Mexican Carriers Provided by the North American Free Trade Agreement and Instructions

Appendix B

For the reasons set forth in the preamble, title 49, chapter X, parts 1043 and 1160 are proposed to be amended as set forth below:

PART 1043 - SURETY BONDS AND POLICIES OF INSURANCE

1. The authority citation for part 1043 continues to read as follows:

Authority: 49 U.S.C. 10101, 10321, 11701, 10927; 5 U.S.C. 553.

§ 1043.1 [amended]

2. Section 1043.1, paragraphs (a) (1) and (b) are amended as follows:

a. In paragraph (a) (1) add the words "or [*13] foreign (Mexican) motor private carrier or foreign motor carrier transporting exempt commodities" after the words "No common or contract carrier".

b. In paragraph (b) add the words "nor any foreign (Mexican) common carrier of exempt commodities" after the words "title 49 of the U.S. Code".

PART 1160 - RULES GOVERNING APPLICATIONS FOR OPERATING AUTHORITY

3. The authority citation for part 1160 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 16 U.S.C. 1456; 49 U.S.C. 10101, 10305, 10321, 10921, 10922, 10923, 10924, 10928 and 11102.

4. In § 1160.1 a new paragraph (h) is added to read as follows:

§ 1160.1 Applications governed by these rules.

* * *

(h) Applications for Mexican carriers to operate in foreign commerce as common, contract or private motor carriers of property (including exempt items) between the U.S./Mexico border, and points in California, Arizona, New Mexico and Texas.

§ 1160.3 [amended]

5. In § 1160.3, paragraph (a), remove the word "and" after the words "of household goods;"; add the words "and Form OP-1MX for Mexican motor property carriers" after the words "for water carriers".

§ 1160.4 [amended]

6. Section 1160.4, paragraphs (a) (1) and [*14] (d) are amended as follows:

a. In paragraph (a) (1) add the words", Mexican motor property carriers that perform private carriage and transport exempt items," after the words "(except household goods)".

b. In paragraph (d) introductory text, add the words ",including Mexican carrier applicants" after the words "household goods applications".

c. In the Note at the end of § 1160.4 add the words "Form OP-1MX for Mexican property carriers," after the words "OP-1 for motor property carriers,".

7. In § 1160.5 a new paragraph (a) (8) is added to read as follows:

§ 1160.5 Commission review of the applications.

(a) * * *

(8) All applications must be completed in English.

* * *

INTERSTATE COMMERCE COMMISSION

[SEE FORM OP-1MX APPLICATION FOR OPERATING AUTHORITY BY MEXICAN CARRIERS PROVIDED BY THE NORTH AMERICAN FREE TRADE AGREEMENT IN ORIGINAL]

INSTRUCTIONS FOR FORM OP-1MX

APPLICATION FOR OPERATING AUTHORITY BY MEXICAN CARRIERS

PROVIDED BY THE NORTH AMERICAN FREE TRADE AGREEMENT

These instructions will assist you in preparing accurate and complete application filings. Applications that do not contain the required information will be rejected and may result in a loss [*15] of the application fee. The application must be completed in English and typed or printed in ink. If additional space is needed to provide a response to any item, use a separate sheet of paper. Identify applicant on each supplemental page and refer to the section and item number in the application for each response.

SECTION I

ICC AUTHORITY. If you now have any **Interstate Commerce Commission** authority or have an application for authority being processed at the Commission, check the "YES" box and indicate the docket or the MX number you have been assigned. Example: MX-987654.

APPLICANT'S LEGAL BUSINESS NAME and DOING BUSINESS AS NAME. The applicant's name should be your full legal business name -- the name on the incorporation certificate, partnership agreement, tax records, etc. If you use a trade name that differs from your official business name, indicate this under "Doing Business As Name." Example: If you are John Jones, doing business as Quick Way Trucking, enter "John Jones" under **APPLICANT'S LEGAL BUSINESS NAME** and "Quick Way Trucking" under **DOING BUSINESS AS NAME**.

Because the Commission uses computers to retain information about regulated carriers, [*16] it is important to spell, space, and punctuate any name the same way each time you write it. Example: John Jones Trucking Co., Inc.; J. Jones Trucking Co., Inc.; and John Jones Trucking are considered three separate companies.

BUSINESS ADDRESS/MAILING ADDRESS. The business address is the physical location of the business. Example: 756 El Camino Real, Jalisco. If applicant receives mail at an address different from the business location, also provide the mailing address. Example: P.O. Box 3721. NOTE: To receive pertinent Commission notices and to ensure that insurance documents filed on applicant's behalf are accepted, notify the Secretary in writing (Interstate Commerce Commission, 1201 Constitution Avenue, N.W., Washington, DC 20423-0001) if the business or mailing address changes.

REPRESENTATIVE. If someone other than the applicant is preparing this form, provide the representative's name, title, position, or relationship to the applicant, address, and telephone and FAX numbers. Applicant's representative will be the contact person if there are questions concerning this application.

U.S. DOT NUMBER. Applicants subject to the Federal Motor Carrier Safety Regulations [*17] are required to register with U.S. Department of Transportation (U.S. DOT) within 90 days after initiating service. Motor carriers that already have been issued a U.S. DOT registration number, should provide it; applicants that have not registered with U.S. DOT should refer to the U.S. DOT information sources under the "Additional Assistance" part of these Instructions.

FORM OF BUSINESS. A business is either a corporation, sole proprietorship, or a partnership. If the business is a sole proprietorship, provide the name of the individual who is the owner. In this situation, the owner is the authority applicant. If the business is a partnership, provide the name of each partner.

SECTION II TYPE OF AUTHORITY. Check the appropriate box(es) for the type(s) of authority you are requesting. Note: A separate filing fee is required for each type of authority requested. See "Fee Policy" in the application form.

SECTION III

INSURANCE INFORMATION. Check the appropriate box(es) to describe the type of business you will be conducting. If you operate vehicles with a gross vehicle weight rating exceeding 10,000 pounds and haul only non-hazardous materials, you are required [*18] to maintain \$ 750,000 minimum liability coverage for the protection of the public. Hazardous materials referred to in the Commission's insurance regulations at 49 CFR 1043.2(b)(2)(c) require \$ 1 million minimum liability coverage; those at 49 CFR 1043.2(b)(2)(b) require \$ 5 million minimum liability coverage.

If you operate only vehicles with a gross vehicle weight rating under 10,000 pounds, you must maintain \$ 300,000 minimum liability coverage. If you operate only such vehicles but will be transporting any quantity of Class A or B explosives, any quantity of poison gas (Poison A), or highway route controlled quantity of radioactive materials, you must maintain \$ 5 million minimum liability coverage.

Minimum levels of cargo insurance must be maintained by all motor property common carriers: \$ 5,000 for loss of or damage to property carried on any one motor vehicle and \$ 10,000 for loss of or damage to property occurring at any one time and place.

Appropriate insurance forms must be filed within **20 days** after the date notice of your application is published in the ICC Register: Form BMC-91 or BMC-91X for bodily injury and property damage, Form BMC-34 for cargo liability. [*19]

The ICC does not furnish copies of insurance forms. You must contact your insurance company to arrange for the filing of all required insurance forms.

SECTION IV SAFETY CERTIFICATION. Applicants for motor carrier authority must complete the safety certification. You should check the "YES" response only if you can attest to the truth of the statements. The "Applicant's Oath" at the end of the application form applies to all certifications, and false certifications are subject to the penalties described in that oath.

If you operate only vehicles with a gross vehicle weight rating under 10,000 pounds and will not transport hazardous materials, you are exempt from the U.S. DOT safety fitness regulations; however, you must certify that you are familiar with and will observe general operational safety fitness guidelines and applicable state and local laws relating to the safe operation of commercial motor vehicles.

You must check only one of the boxes in this section.

Failure to comply with the safety fitness standards of the U. S. Department of Transportation will result in the revocation of the motor carrier authority.

SECTION V AFFILIATIONS. All applicants must disclose [*20] pertinent information concerning affiliations, if any, with other ICC-regulated entities.

SECTIONS VI AND VII HOUSEHOLD GOODS CERTIFICATIONS. If you are applying for household goods common carrier or household goods contract carrier authority, you must complete the appropriate certification concerning these specialized services in Section VI.

If you are applying for household goods contract carrier authority, you also must provide the information concerning your operations in Section VII.

SECTION VIII APPLICANT'S OATH. Applications may be prepared by the applicant or an authorized representative. In either case, the oath must be signed by the applicant. In the case of companies, an authorized employee in the ownership structure may sign. An individual with power of attorney to act on behalf of the applicant may sign, provided that proof of the power of attorney is submitted with the application.

LEGAL PROCESS AGENTS All motor carrier applicants must designate a process agent in each state where operations are authorized. Process agents who will accept legal filings on applicant's behalf are designated on ICC Form BOC-3. Form BOC-3 must be filed within **20 days** [*21] after the date notice of the application is published in the ICC Register.

TARIFFS All household goods motor common carriers and all motor common carriers that will participate in collectively set rates must have tariffs on file with the Commission and in effect before beginning operations. If you require assistance in tariff matters, contact the Commission's Automated Response Capability (ARC) telephone system - (202) 927-7600.

STATE NOTIFICATION Before beginning operations, all applicants must contact the appropriate regulatory agencies in every state in and through which the carrier will operate to obtain information regarding various state rules applicable to interstate authorities. It is the applicant's responsibility to comply with registration, fuel tax, and other state regulations and procedures. Begin this process by selecting the state of California, New Mexico or Texas as your base state for payment of registration fees. See 49 CFR Part 1023. You should select the state in which you will operate the largest number of motor vehicles in the next year and contact that state's transportation agency to obtain registration forms and instructions. Failure to accomplish [*22] this state registration could subject you to substantial state penalties as well as the potential loss of your operating authority.

MAILING INSTRUCTIONS To file for authority you must submit an **original and one copy** of this application with the appropriate filing fee to ICC Headquarters and one copy to the ICC Regional Office that corresponds with your business location.

NOTE: RETAIN A COPY OF THE COMPLETED APPLICATION FORM AND ANY ATTACHMENTS FOR YOUR OWN RECORDS.

Mailing addresses for applications:

HEADQUARTERS

Interstate Commerce Commission, Office of the Secretary, ATTN: APPLICATIONS,
1201 Constitution, N. W., Washington, DC 20423-0001

REGIONAL OFFICES

Interstate Commerce Commission, Xerox Center, 55 West Monroe, Suite 550,
Chicago, IL 60603-5003, (312) 353-6204

The states of Campeche, Chiapas, Chihuahua, Coahuila, Durango, Guanajuato,
Guerrero, Hidalgo, Mexico, Michoacan, Nuevo Leon, Oaxaca, Puebla, Queretaro,
Quintana Roo, San Luis Potosi, Tabasco, Tamaulipas, Tlaxcala, Veracruz, Yucatan,
Zacatecas, and Distrito Federal.

Interstate Commerce Commission, 211 Main Street, Suite 500, San Francisco, CA
94105-1919, (415) 744-6520

The [*23] states of Aguascalientes, Baja California Norte, Baja California Sur,
Colima, Jalisco, Morelos, Nayarit, Sinaloa, and Sonora.

ADDITIONAL ASSISTANCE COMMISSION INFORMATION SOURCES

Additional information on obtaining operating authority or monitoring the status
of your applications is available through the Commission's Automated Response
Capability (ARC) telephone system. After dialing (202) 927-7600, press 1, then
request appropriate menu number indicated below. You may use the ARC 24 hours a
day, 7 days a week to obtain information in the following areas:

MENU	
Information Requested	NUMBER
. Status of your application (NOTE: Tracking the status of your application can be simplified and expedited if you refer to the assigned docket number when making inquiries. You will be informed of your docket number by letter sent on the date notice of your application appears in the ICC Register.)	1
. Assistance in filing your application	3
. Status of insurance and process agent filings	2
. Tariff filing	4

If you require information that is not available in the automated response
system, the ARC will guide you to an appropriate ICC staff member who [*24]
will be able to assist you in other areas.

U. S. DEPARTMENT OF TRANSPORTATION INFORMATION SOURCES

U.S. DOT Registration and Safety Ratings

. To obtain information on registering with U.S. DOT (filing Form MCS-150) or to
request a safety fitness review, write to:

Director, Motor Carrier Field Operations, Federal Highway Administration,
U.S. Department of Transportation, Washington, DC 20590

or call: 800 832-5660

. For information concerning a carrier's assigned safety rating, call: (800) 832-5660

U.S. DOT Hazardous Materials Regulations

. To obtain information on whether the commodities you intend to transport are considered to be hazardous materials:

Refer to the provisions governing hazardous materials in the Federal Motor Carrier Safety Regulations at Parts 170 through 189 of Title 49 of the Code of Federal Regulations (CFR), particularly the Hazardous Materials Table at 49 CFR Part 172, or contact U. S. DOT at (202) 366-6121.

. To obtain information about DOT hazardous materials transportation registration requirements:

Contact U.S. DOT at (202) 366-4109.